

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI GAMING COMMISSION

APPELLANT

v.

CAUSE No. 2008-SA-02066

EDWARD SIMON

APPELLEE

MISSISSIPPI GAMING COMMISSION'S APPEAL FROM
FINAL DECISION OF THE CIRCUIT COURT OF
TUNICA COUNTY FINDING THE COMMISSION'S DENIAL OF
A WORK PERMIT TO EDWARD SIMON TO BE
ARBITRARY AND CAPRICIOUS

BRIEF OF APPELLEE

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MISSISSIPPI GAMING COMMISSION

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v.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or recusal.

1. Edward Simon, Appellee
2. Deanna B. Saltzman, Esq., Counsel for Appellant
3. Thomas Mueller, Esq., Counsel for Commission
4. Honorable Joan Myers, Hearing Examiner
5. Mississippi Gaming Commission, Appellant
6. Mississippi Office of the Attorney General
7. The Honorable Albert B. Smith, III, Circuit Judge
8. Robert S. Little, Jr., Counsel for Appellee


ROBERT S. LITTLE JR.
Counsel for Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUE	1
STATEMENT REGARDING ORAL ARGUMENT	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	6
STANDARD OF REVIEW	6
WHETHER THE CIRCUIT COURT OF TUNICA COUNTY ERRED IN FINDING THAT THE MISSISSIPPI GAMING COMMISSION'S DENIAL OF EDWARD SIMON'S WORK PERMIT APPLICATION WAS ARBITRARY AND CAPRICIOUS	8
CONCLUSION	11
CERTIFICATE OF SERVICE	14
ADDENDUM	

TABLE OF AUTHORITIES

Evans, et al v. Boyle Flying Service, 680 So.2d 821 (Miss. 1996)	12
Kellum v. Johnson, 115 So.2d 147 (Miss. 1959)	7
L.H. Conrad Furniture Co. v. Mississippi Tax Comm'n 133 So. 652 (Miss. 1931)	13
Mississippi Gaming Commission v. Pennebaker, 824 So.2d 552 (Miss. 2002)	6
Public Employees' Retirement System v. Marquez, 774 So.2d 421 (Miss. 2000)	9
Sheffield v. Reece, 28 So.2d 745 (Miss. 1947)	7
Ziegler v. Ziegler, 164 So. 768 (Miss.)	12

STATEMENT OF THE ISSUE

WHETHER THE CIRCUIT COURT OF TUNICA COUNTY ERRED IN FINDING THAT THE MISSISSIPPI GAMING COMMISSION'S DENIAL OF EDWARD SIMON'S WORK PERMIT WAS ARBITRARY AND CAPRICIOUS.

STATEMENT REGARDING ORAL ARGUMENT

Your Appellee, Edward Simon, submits that this is a unique case in which the outcome may have lasting and substantial effects upon all employees of the gaming industry in Mississippi and which may thereby set a precedent establishing the breadth of power afforded to the Mississippi Gaming Commission and the standards under which it operates. As such, your Appellee believes that oral arguments would assist in clarifying the issue before the Court and the potential repercussions of its decision. Oral arguments are, therefore, requested.

STATEMENT OF THE CASE

In the interest of judicial convenience and brevity, and finding no need to restate the facts in a light any more beneficial to the himself, your Appellee concurs with the statement of the Appellant in all respects, save that he would supplement the Attorney General's summary of the procedural posture to note that the Appellant's *Motion for Stay* was denied by both the lower court and the Court of Appeals for "mak[ing] no adequate showing of irreparable harm or likelihood of success on the merits [Record Excerpts 4,5].

SUMMARY OF THE ARGUMENT

Edward Simon has worked in the casino industry in Mississippi virtually since its inception. Indeed, he continues to work there to this day. The Mississippi Gaming Commission would argue to this Court that it has a right, by virtue of an extremely broad interpretation of its authorizing statute, to deny Mr. Simon his right to continue his employment at any time that it may deign to act. The Circuit Court of Tunica County found that such a move was both arbitrary and capricious, and this Court should affirm that conclusion.

In 1997, the Gaming Commission legally and correctly denied Mr. Simon renewal of his gaming badge due to his being in the constructive custody of the Mississippi Department of Corrections [Record Excerpts 68-69]. It was well aware, at that time, of his legal issues in the Circuit Court of DeSoto County and, in fact, informed him that he would not be eligible to renew his gaming license "until he is release by the Court" [R.E. 69]. The Commission did not produce any evidence of Mr. Simon's plea (or his guilt), except his own admission to same on the Commission's application, yet it made specific mention that

his guilty plea was "not accepted by the court, i.e. there will be no conviction of a crime" Id.

In 1998, Mr. Simon, free of any criminal record and not adjudged "guilty" by any court, submitted another application to the Commission which was unanimously granted, with their full knowledge of his background (Indeed, in light of his background, the local gaming official actually requested and received a unanimous decision of the Commissioners. See Record Excerpts, p. 41). The Attorney General acknowledges in its own brief that this was "for reasons unknown." Likewise, "for reasons unknown," the Commission renewed your Appellee's license in 2000 and in 2003, but then "for [other] reasons unknown," it chose not to do so in 2006. Taking the same facts and evidence, about the same person, on the same application, and yet rendering a different decision is the very definition of arbitrary and capricious.

The Appellant has attempted to confuse the issue in its brief by arguing that it is merely following statutory law or rectifying a mistake. However, it has offered no proof, reasoning, or argument as to why it chose to do this in 2006, rather than in 2000, or 2003, or for that matter,

2012. The arbitrariness and capriciousness of the Commission's decision was in their *timing*.

The Commission further seeks to cloud the issue in this appeal by arguing, at length (ten pages), its purported authority to deny a gaming badge based on "any evidence," a question which is not even *at issue* before this Court. While your Appellee would relish the opportunity to argue this rather absurd notion, this brief will follow the Mississippi Rules of Appellate Procedure and relegate itself strictly to the single issue at bar, namely, the arbitrariness and capriciousness of the Gaming Commission's timing in denying Mr. Simon's gaming badge in 2006.

ARGUMENT

STANDARD OF REVIEW

Your Appellee makes no argument against the strict standard which governs the review of administrative agency decisions, and those of the Mississippi Gaming Commission in particular. In *Pennebaker*, the Court made it clear that it will generally uphold Commission decisions which are supported by "any evidence" *Mississippi Gaming Commission v. Pennebaker*, 824 So.2d 552 (Miss. 2002). While this may seem, on its face, to be clear and unambiguous language, the Court must first consider the repercussions of assigning to those words their broadest meaning.

By common usage, "any evidence" would certainly include:

hearsay (the statute does not say "any *admissible* evidence")

gossip (it doesn't read "any *credible* evidence")

admissions not chargeable ("I once tried cocaine in college")

crimes inferred by remedial measures (a bad check reimbursed in cash the following day)

crimes for which the applicant was arrested or indicted but which were later dropped for lack of evidence or "nolle prossed" (the applicant never even had a chance to have his day in court)

This Court has stated that

when a statute is ambiguous and subject to multiple interpretations, courts need to understand the possible effects in order not to interpret the statute in such a way as to cause absurd results. *Sheffield v. Reece*, 28 So.2d 745 (Miss. 1947).

A decade later, the Court further stated, in its rule for construing statutes, that "courts should not convict the legislature of unaccountable capriciousness" *Kellum v. Johnson*, 115 So.2d 147 (Miss. 1959).

Should this court allow the Mississippi Gaming Commission to take the language "any evidence" and use it as a *carte blanche* to justify essentially any decision at any time for any reason, the results will inevitable devolve to the absurd, and any attempt to deviate back to rationality will then itself become arbitrary and capricious. The Court should place upon the Commission some level of reasonableness and reliability for its decisions, at least requiring it to proffer an excuse better than "for reasons unknown." The very credibility of the gaming industry in Mississippi is at stake.

Nevertheless, "for reasons unknown" is the equivalent of no reason at all, which is perhaps the only burden of proof below "any evidence."

THE SINGLE ISSUE ON APPEAL: WHETHER THE CIRCUIT COURT OF TUNICA COUNTY ERRED IN FINDING THAT THE MISSISSIPPI GAMING COMMISSION'S DENIAL OF EDWARD SIMON'S WORK PERMIT WAS ARBITRARY AND CAPRICIOUS

The lower court found that

When the Commission became aware of [Simon's] charge in 1997, it made the decision to suspend [Simon's] work permit until such time as he was released from probation. Once [Simon] had successfully completed his probation and had the charges against him dismissed, the Commission again made the decision to reinstate his work permit and again renew it in 2002.

This is not a case where the Commission is claiming that it only recently discovered [Simon's] run-in with the law; the Commission had all the pertinent facts before it in 1997 when it chose to take the its (sic) disciplinary action. It had the opportunity to then deny [Simon's] work permit unequivocally. It chose not to. Once [Simon] finished his probationary period and reapplied for his work permit, the Commission again had the discretion to deny his request. It chose not to. In 2002 when [Simon's] work permit came up for renewal, the Commission again had the discretion to deny his request. It chose not to. [Circuit Record 54-55].

The Commission, while in the Circuit Court of Tunica County, had the opportunity to explain to the Court why it had thrice issued a gaming badge to Ed Simon, only to deny it a decade later. It chose not to. The Commission, arguably, had a second chance to explain to this Court why

it chose to deny a 15-year employee his livelihood over a crime which occurred in the first two years of his career. Again, it chose not to.

The Commission's silence as to the reasoning behind its late decision (or more precisely, its explanation of "for reasons unknown") should be deemed *per se* arbitrary and capricious. "If an administrative agency's decision is not based on substantial evidence [or in this case any evidence], it necessarily follows that the decision is arbitrary and capricious" *Public Employees Retirement System v. Marquez*, 774 So.2d 421, 430, [bracketed comments added].

Finally, the Commission's arbitrary denial of Mr. Simon's work permit, after thirteen years on the job and a decade after having had his charge dismissed, opens the door to far more unsavory dealings than those likely to be committed by a man with a dismissed marijuana charge. With the sheer number of gaming inspectors statewide, the low salaries paid them, and the near total discretion they have in investigating thousands of gaming permittees, the potential would exist for widespread graft. A corrupt gaming inspector could literally extort thousands of dollars from applicants, all the while threatening to

expose a "overlooked" crime if the applicant didn't cooperate. As there is a total absence of explanation from the Commission as to how the events transpired in Mr. Simon's case, we are left to wonder whether it was oversight, ineptitude, dishonesty, personnel changes, policy changes, or a change in statutory interpretation which brought about the Commission's actions. Given that uncertainty, and the Commission's failure to proffer any explanation, this Court should affirm the finding of the Circuit Court of Tunica County that their most recent action was arbitrary and capricious.

CONCLUSION

In its brief to this Court, the Mississippi Gaming Commission has argued its case as if it had denied Ed Simon a gaming badge in 1997, utilizing a court record of his guilty plea to a felony marijuana charge. It neither denied his work permit for that reason nor using that evidence. Moreover, the lower court did not find that that would have been arbitrary and capricious if it had. It appears that the Commission wishes to use this case before the Court to argue an issue which is not on appeal, and it thereby hopes to set a precedent to broaden its power and discretion. It is your Appellee's prayer that the Court will not do so.

This brief has imagined some of the absurd scenarios which could result should the Court give the Commission the power, unfettered by guidelines of credibility, admissibility, reason, or substantiation, to make any decision, reverse any decision, grant any application, or deny any request at any time for any reason or "for reasons unknown." Any just cannot simply mean any. It must have some parameters, some limits short of the absolute. Such an undefined power is overbroad, and American courts have limited government power due to overbreadth since the

founding of the Republic. It is incumbent upon the Court to extend the meaning of a statute beyond its precise words "when necessary to prevent the law from becoming a nullity" *Evans, et al v. Boyle Flying Service*, 680 So.2d 821 (Miss. 1996).

While this brief has purposefully refrained from an attack on the Constitutionality of such a vague and overbroad authorizing statute due to the limited scope of the issue under appeal, your Appellee would respectfully ask this Court to remember its words from *Ziegler v. Ziegler*, "Unthought of results must be avoided if possible, especially if injustice follows, and unwise purpose must not be imputed to the Legislature when a reasonable construction is possible" *Ziegler v. Ziegler*, 174 So.2d 768.

Moreover, the Court's decision in this case could have far-reaching implications for gaming in Mississippi. Affirming the decision of the Circuit Court of Tunica County would merely serve to right one injustice to one man. Reversing the lower court would set a precedent which would grant the Gaming Commission unbridled power over individual Mississippians with no safeguards of due process, rules of evidence, or security in their chosen

vocations. "In construing a statute of doubtful meaning, the consequences of any particular construction should be considered, whether they be good or bad" *L.H. Conrad Furniture Company v. Mississippi State Tax Commission*, 133 So. 652 (Miss. 1931).

WHEREFORE, PREMISES CONSIDERED, Edward Simon hereby requests this Honorable Court to affirm the Order of the Circuit Court of Tunica County.

Respectfully submitted this the 28th day of July, 2009.

EDWARD SIMON, APPELLEE



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CERTIFICATE OF SERVICE

I, ROBERT S. LITTLE, JR., counsel for the Appellee Edward Simon do hereby certify that I have this day caused to be delivered via Federal Express, or United States Mail, postage prepaid, a true and correct copy of the foregoing to:

Deanne B. Saltzman, Esq.
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Post Office Box 23577
Jackson, Mississippi 39225

Judge Albert B. Smith
Circuit Court Judge
Post Office Drawer 478
Cleveland, Miss. 38732

So certified this the 28th day of July 2009.



ROBERT S. LITTLE JR.

ADDENDUM

IN THE CIRCUIT COURT OF TUNICA COUNTY, MISSISSIPPI

EDWARD SIMON

APPELLANT

v.

CAUSE No. 2007-282-ABS

MISSISSIPPI GAMING COMMISSION

APPELLEE

BRIEF OF THE APPELLANT,

EDWARD SIMON

ORAL ARGUMENT REQUESTED

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FILED

MAR 17 2008

TUNICA COUNTY MISS.
SHARON GRANBERRY, CIRCUIT CLERK
BY *Daura Webb*

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
ISSUES/ERRORS.....	2
ARGUMENT.....	3
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

Willby v. State, 47 So. 465, 466 (Miss. 1908).....4

Warren County Board of Education v. Wilkinson,
500 So.2d 455,460 (Miss. 1986).....6

Sprouse v. Mississippi Employment Security Commission
639 So.2d 901,902 (Miss. 1994).....7

INTRODUCTION

This Administrative Appeal of the decision of the Mississippi Gaming Commission arises from the Commission's denial of Edward Simon's work permit after thirteen years of being licensed by the State. Mr. Simon was originally granted a work permit in 1994, was granted a renewal in 2002, and was denied his renewal in 2006, the action giving rise to the Appeal at Bar. The Commission cites as its sole reason for denial their allegation that he committed a felony in 1997, a full decade before this incongruous and unsupported decision.

The general issues before this Court are (i) whether the Commission's allegations are substantiated; (ii) whether the Order of Dismissal and Expungement of Records by a Circuit Court of this state are binding upon the Commission; (iii) whether the Commission can make findings of fact concerning an applicant's background absent due process; and (iv) whether the Commission has overstepped its authority through the overbroad interpretation of statute and through arbitrary and capricious action. For purposes of efficiency and brevity, these questions can be consolidated into three issues for the Court's consideration.

ISSUES/ERRORS ON APPEAL

I.

THE MISSISSIPPI GAMING COMMISSION EXCEEDED ITS AUTHORITY AND DENIED THE APPELLANT'S WORK PERMIT WITHOUT LEGAL SUBSTANTIATION AND WITHOUT DUE PROCESS OF LAW.

II.

THE MISSISSIPPI GAMING COMMISSION EXCEEDED ITS AUTHORITY BY REFUSING TO ACKNOWLEDGE THE ORDER OF THE CIRCUIT COURT OF DESOTO COUNTY, MISSISSIPPI.

III.

THE MISSISSIPPI GAMING COMMISSION'S REFUSAL TO RENEW THE APPELLANT'S WORK PERMIT WAS ARBITRARY AND CAPRICIOUS AND WAS BASED ON AN OVERBROAD INTERPRETATION OF ITS STATUTORY AUTHORIZATION.

ARGUMENT

Edward Simon applied for, and was granted, a work permit by the Mississippi Gaming Commission in 1994. He accepted a position at Sam's Town Casino in Tunica County, the establishment which would be his sole gaming employer for the next thirteen years. In 1997, Mr. Simon was arrested in Desoto County on the charge of possession of marijuana, more than an ounce but less than a kilogram. This fact is undisputed and admitted by the Appellant. (Exhibits on Review 18).

Subsequent to his arrest, Simon's work permit was briefly suspended (or denied renewal) due to his being on probation with the Justice Network, Inc. At the time, the Hearing Examiner wrote in the Commission's official decision:

The appellant in this case is serving a period of probation, which if successfully completed will result in having the guilty plea not accepted by the Court, i.e. there will be no conviction of a crime. *Until appellant is released by the Court, he remains on probation and is not eligible to receive a work permit. (Exhibits on Review, 69). Emphasis added.*

Simon did timely complete his probation with the Justice Network, Inc. and was indeed granted (unanimously) a renewed work permit by the Mississippi Gaming Commission.

(Exhibits on Review 41). He went back to work at Sam's Town Casino and was a model employee for the better part of the next decade, including an intermediate renewal of his permit by the Commission (in 2002) without comment concerning the 1997 marijuana charge.

The records of Simon's 1997 arrest and *any and all subsequent court action* have since been dismissed and expunged from "all public records" by Order of the Circuit Court of Desoto County, Mississippi (Exhibits on Review, 19-24). Thus, any records which the Gaming Commission has maintained on Mr. Simon concerning this incident are in direct violation of the Court's Order.

Upon Mr. Simon's application for renewal of his work permit in 2006, the Commission, after previously granting a work permit upon each and every required renewal for the past decade, save during his probationary period, arbitrarily denied the current application based on the alleged events of 1997. Like an albatross soaring in from the wild blue yonder, the Commission has plucked an incident from Mr. Simon's past, which it ignored for six years and for which it has no legal records or support, and used it to deny the Appellant the right to work at his chosen occupation, a right recognized by our Supreme Court

for 100 years. "Liberty in its broad sense implies a right to follow any of the ordinary callings of life without being unduly trammelled" Willby v. State, 47 So. 465, 466 (Miss. 1908).

I.

The Commission has no legal basis on which to deny the Appellant's work permit. Mr. Simon has never been convicted on a felony crime and has never admitted in any prior proceedings in this action to having committed such a crime or pleaded guilty to a felony crime. He has admitted only to being placed on probation and non-adjudication and to having been arrested, but otherwise the Commission's contention relies solely on assumption, hearsay, and/or records which have been legally expunged and to which it has no right to even possess. Moreover, the Commission was fully aware of his probation and non-adjudication as early as 1998 and went so far as to even make a finding on the record that the Appellant would not be eligible for renewal of his permit "UNTIL" he completed his probation with the Justice Network (Exhibits on Review, 69).

The Commission will likely contend that it does not need a formal conviction in order to find that an applicant has committed a felony crime. But what then does it need? Rumors on the street or mere allegations made by a co-defendant? Perhaps an arrest report in the newspaper? There must be a standard, with the protections afforded by Due Process of Law, by which the Commission can make such a life-altering determination. The Commission is a state agency, and therefore its actions against a citizen must be reviewed by this Honorable Court where Constitutional issues of due process exist. Questions of the Constitutionality of an agency's conduct, including the constitutional rights of a party, are matters to be decided *de novo* by the reviewing courts. Warren County Board of Education v. Wilkinson, 500 So. 2d, 455, 460 (Miss. 1986) citing County Board of Education of Alcorn County v. Parents and Custodians of Students at Rienzi Attendance Center, 168 So. 2d 814, 819 (Miss. 1964).

The Mississippi Supreme Court has more recently found that to overturn a decision of a state agency, the reviewing court must find only one of these defects: (i) that the decision is not supported by substantial evidence; or (ii) that it is arbitrary and capricious; or (iii) that

it is beyond the scope and power granted to the agency; or
(iv) that it violates a party's Constitutional rights.

Sprouse v. Mississippi Employment Security Commission, 639
So. 2d 901,902 (Miss. 1994).

In the case at Bar, the Commission made no findings of fact, other than to adopt information gleaned from records which it was barred by Court Order from possessing. In addition, the alleged information was nearly a decade old and had been known to the Commission for the entire period--including during a prior renewal of Mr. Simon's permit by the Commission. The Agency's choosing to act on this illegal information at this time is the very definition of arbitrary and capricious.

II.

As stated above, there is a Court Order in place from the Circuit Court of Desoto County, Mississippi dismissing all charges against Mr. Simon and expunging all public records. In the eyes of the law, there was no crime. There was not even an arrest. The Court wrote:

That this Order shall be to restore Edward Ray Simon^{*}, in the contemplation of the law, to the status he occupied before such arrest, indictment, plea of guilty, and sentence. Further, Edward Ray Simon shall not be held thereafter under any provision of law to be guilty of perjury or otherwise given [sic] a false

statement by reason of his failure to recite or acknowledge such arrest, indictment, plea of guilty, and sentencing in response to any inquiry made of him *for any purpose* concerning the arrest, indictment, plea of guilty and sentencing in the above styled and numbered cause. (Exhibits on Review, 21). *Emphasis added.*

The Order of the Circuit is clear and all-encompassing. The incidents concerning Mr. Simon's 1997 arrest *did not even occur* within the eyes of the law.

If the State of Mississippi, through the Mississippi Gaming Commission, should be allowed an exemption to inquire as to whether the applicant had ever had an expungement or participated in a non-adjudication program, then what is the purpose of having expungement and non-adjudication programs? The Commission is attempting to circumvent the very purpose which the legislature intended in passing these statutes in the first place.

The Order of the Circuit Court of Desoto County should be respected by the Commission, and this Court should mandate that it do so.

*

III.

The Commission appears to believe that it is authorized to deny a work permit based on any information that an applicant has committed a felony crime. It does not believe that it needs a formal conviction, nor does it believe that it must conduct any legal hearing of its own to make such a finding. Yet, it is unable to enumerate what criteria it may use to substantiate its decisions. Such a position is not just overly-broad, it is ultimately broad.

Courts have historically struck down laws which are not adequately specific to secure the rights of the people. There must be finite and defined boundaries to any law, and in this case there seem to be none. If the criteria are not limited to an arrest, an indictment, a conviction, or an admission, then to what are they limited? In the case at bar, the Commission does not have any of the above specified grounds against Mr. Simon, yet they have still refused his work permit. It is impossible to obey the law if the enforcing agency cannot even define the law.

CONCLUSION

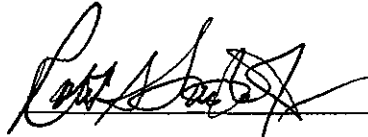
This Court is faced with questions which will ultimately set the parameters for the balance of power between the executive and judicial branches of government in the State of Mississippi. Must an executive agency heed the direct and unambiguous order of a Circuit Court judge concerning a dismissal and expungement? May an executive agency establish its own tribunal to establish guilt or innocence and then decree its own rules of evidence therein? May the legislature grant unto an agency *carte blanche* to enforce its regulations in any way that it sees fit?

This Court should set reasonable and legal boundaries for the Mississippi Gaming Commission in the enforcement of its regulations, and it should make clear that in *all cases*, a Circuit Court Order is binding upon all branches of government, and all persons and agencies therein, until and unless it be overturned by a higher court.

Your Appellant prays this Honorable Court to overturn the arbitrary and unsubstantiated decision of the

Mississippi Gaming Commission and mandate that the
Commission immediately issue to him a renewed work permit.

RESPECTFULLY SUBMITTED,

A handwritten signature in dark ink, appearing to read "R. Stan Little, Jr.", is written over a horizontal line.

R. STAN LITTLE, JR.
Counsel for Appellant

CERTIFICATE OF SERVICE

I, the undersigned R. Stan Little, Jr., Esquire, do hereby certify that I have this day mailed, first-class postage pre-paid, a true and correct copy of the above and foregoing Appellant's Brief to the following:

Honorable Deanne B. Saltzman
Special Assistant Attorney General
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Post Office Box 23577
Jackson, Mississippi 39225-3577

The Honorable Albert B. Smith, III
Circuit Court Judge
Post Office Drawer 478
Cleveland, Mississippi 38732

SO CERTIFIED THIS THE 17th DAY OF MARCH, 2008.


R. STAN LITTLE, JR., ESQ